91-1889

No.

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAIME L. FERRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTION PRESENTED

Whether the sentence imposed violates due process of law, where it rests on incredible assumptions, not supported by the record, thus amounting to sentencing under the Sentencing Guidelines on the basis of erroneous information, and invalid premises.

(1b) PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Jaime L. Ferra, was the defendant in the United States District Court for the Eastern District of Wisconsin, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, United States of America, was the plaintiff in the District Court, and appellee in the Court of Appeals.

(1c) TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties Involved	ii
Judgment, Opinion and Orders Below	4
Jurisdictional Statement	5
Constitutional Provision	6
Statement of the Case	7
Reasons for Granting the Writ	12
1. The sentence imposed violates due process of law, where it rests on incredible assumptions, not supported by the record, thus amounting to sentencing on the basis of erroneous information, and invalid premises.	12
Conclusion	18

PAGE

Appendices:

A. Court of Appeals Opinion dated November 19, 1991. App. 1

B. Court of Appeals Opinion dated April 24, 1990. App. 7

(1d) Judgment Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 91-1584, decided November 19, 1991, affirming defendant's judgment of conviction and sentence, one Justice concurring in part and dissenting in part, is attached as App. A to this Petition.

The previous Opinion of the Court of Appeals for the Seventh Circuit, No. 89-1507, decided April 24, 1990, which vacated the judgment, and directed remand for new hearing on motion to suppress, for findings with respect to co-conspirator statements, and for explanation of reasons for guidelines departure at sentencing, is attached as App. B to this Petition. That (first) Opinion is reported at 900 F.2d 1057 (7 Cir. 1990).

TABLE OF AUTHORITIES

Cases

PAGE

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 80 L.Ed.2d 502 (1984) 15

Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526, 61 L.Ed.2d 720 (1979) 16

McGee v. United States, 462 F.2d 243 (2 Cir. 1972) 13

Thelma C. Raley, Inc. v. Kleppe, 867 F.2d 1326 (11 Cir. 1989) 15

Townsend v. Burke, 334 U.S. 736, 92 L.Ed. 1690 (1948) 12, 14

United States v. Delvecchio, 920 F.2d 810 (11 Cir. 1991) 15

United States v. Espinoza, 481 F.2d 553 (5 Cir. 1973) 13

United States v. Ferra, 900 F.2d 1057 (7 Cir. 1990) 7, 8

United States v. Fonner, 920 F.2d 1330 (7 Cir. 1990) 14, 15

United States v. Harris, 558 F.2d 366 (7 Cir. 1977) 12

PAGE

United States v. Huddleston,
929 F.2d 1030 (5 Cir. 1991) 15

United States v. Lira-Barraza,
897 F.2d 981 (9 Cir. 1990) 13

United States v. Sands,
908 F.2d 304 (8 Cir. 1990) 15

United States v. Tucker,
404 U.S. 443, 30 L.Ed.2d 592
(1972) 12, 14

United States v. White,
888 F.2d 490 (7 Cir. 1989) 14

Constitutional Provision

Amendment V, United States
Constitution 6

Statutes and Rules

18 U.S.C. 922(a)(1) 2

18 U.S.C. 922(n) 2

18 U.S.C. 3742(e)(2) 13

18 U.S.C. 3742(e)(3) 13

21 U.S.C. 841(a)(1) 2, 3

18 U.S.C. 2 3

	PAGE
28 U.S.C. 1257(a)	5
Supreme Court Rule 10.1	5
Supreme Court Rule 12.1	5
Supreme Court Rule 13.1	5

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

JAIME L. FERRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, Jaime L. Ferra (hereafter, petitioner, or defendant), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the judgment (conviction and sentence) of the United

States District Court for the Eastern District of Wisconsin.

Defendant was convicted of (Count 1) engaging in the business of dealing in firearms without license between December, 1986 and July 15, 1988, in violation of 18 U.S.C. 922(a)(1); (Count 2) between September 17, 1987 and November 13, 1987, while under a criminal information in Milwaukee County Circuit Court for the felony of concealing stolen property, knowingly and wilfully receiving a particular firearm which had moved in interstate commerce, in violation of 18 U.S.C. 922(n); (Count 3) possession of approximately 1/3 lb. of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), on April 22, 1988; and (Count 4) possession of approximately 1/2 ounce of cocaine

with intent to distribute, in violation of 21 U.S.C. 841(a)(1), on July 15, 1988. (Each count also alleged 18 U.S.C. 2 in conjunction with each statute violated.)

Judgment, Opinion and Orders Below

The Opinion of the Court of Appeals for the Seventh Circuit, affirming the District Court's judgment, with one Justice concurring in part and dissenting in part, is set out as App. A.

(1e) Jurisdictional Statement

On November 19, 1991, the Court of Appeals filed its Opinion affirming the judgment of the District Court. (App. A)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. Sec. 1257(a) and Rules 10.1, 12.1 and 13.1 of this Court.

Constitutional Provision

AMENDMENT V

"No person shall be ... deprived of ... liberty ... without due process of law...."

STATEMENT OF THE CASE

This Petition addresses the propriety of the reasons advanced for upward guidelines departure at sentencing.

On first appeal, the United States Court of Appeals remanded, with directions for the court to state reasons for its departure from the Guidelines or otherwise justify the sentence of 120 months, which the court imposed. United States v. Ferra, 900 F.2d 1057, 1064 (7 Cir. 1990) (App. 20). As the Court of Appeals noted on first appeal, "the judge did not explain why he chose 120 months" (900 F.2d at 1064; App. 19), "instead of the 41-51 months [the Sentencing Guidelines] prescribe." (900 F.2d at 1058; App. 7.)

Upon resentencing--which included defendant's challenge to the government's

assertion of the amount of drugs involved--the court imposed the same sentence as before: that is, 60 months on each of Counts 1 and 2; 120 months on each of Counts 3 and 4; all sentences to run concurrently; for a total of 120 months imprisonment. (App. 1)

On second appeal, the Court of Appeals noted, that "the district court reentered the 120-month sentence, although on substantially different reasoning." (App. 1)

Although the amount of cocaine involved in the actual offenses of which defendant was convicted, was 5.83 ounces, Ferra, supra, 900 F.2d at 1061, upon recalculations at resentencing, taking into account, amounts of cocaine allegedly traded for stolen merchandise, the District Court concluded that the

actual amount of cocaine involved in defendant's activities was at least in excess of 500 grams. (Tr. 3/7/91, pp. 59-61)

And while defendant disputed the amount of cocaine, due to the unreliability of evidence from burglars who claimed regular dealings with defendant, trading stolen goods for money and cocaine, (see Tr. of 3/7/91, pp. 24-44), still, per defendant's calculations, even accepting the testimony of the burglars, less than 300 grams of cocaine was involved. (Ibid.)

Defendant stresses the defense calculations (Tr. of 3/7/91, pp. 24-44), rather than the District Court's, (Tr. of 3/7/91, pp. 59-61), are correct, and remain at a loss how the same "raw material data" can be aggregated by the

defense and the court with a disparity of some 200 grams. Yet, this disparity was used to justify characterizing the offense severity level at 26. (Tr. of 3/7/91, p. 61)

As dissenting Justice Cudahy noted in the Opinion of the Court of Appeals, the "sentence seems to rest on ... incredible assumptions...." (App. 5) Justice Cudahy stated further:

> "The scenario underlying the sentence called for the burglar Diaz to meet with Ferra almost every day, including Sundays and holidays, in order to trade stolen goods for cocaine 200 times over a period of 30 weeks. I suppose it is conceivable for a highly motivated burglar to burgle at such a frenzied pace, but for him to meet and transact business with his 'fence' that frequently is simply unimaginable. The alternative rationale furnished by the majority (based on the amount of cash discovered) was discounted by the district court, which must, in any event, make these

determinations in the first instance.

The majority too lightly regards the requirement that aggravating facts must be found by a preponderance of the evidence." (Citations omitted.) (App. 5)

* * *

"I do not suggest that the district judge abused his discretion in imposing sentence on Ferra. But the record makes clear that the sentencing is exactly that--an exercise of discretion. This is a practice that the Guidelines do not allow." (App. 5-6)

* * *

Defendant urges that the sentence imposed violated due process of law as guaranteed by the Due Process Clause of the Fifth Amendment.

REASONS FOR GRANTING CERTIORARI

1.

The sentence imposed violates due process of law, where it rests on incredible assumptions, not supported by the record, thus amounting to sentencing on the basis of erroneous information, and invalid premises.

There is a federally-recognized due process right not to be sentenced on the basis of erroneous information. Townsend v. Burke, 334 U.S. 736, 92 L.Ed. 1690 (1948); United States v. Tucker, 404 U.S. 443, 30 L.Ed.2d 592 (1972); United States v. Harris, 558 F.2d 366, 372 (7 Cir. 1977).

> "In Townsend v. Burke, supra, the Supreme Court held that it violated due process to sentence a defendant 'on the basis of assumptions which were materially untrue.' ... Tucker and Townsend have been read broadly to preclude reliance upon 'improper or inaccurate information' in making the sentencing determination." Harris, ibid., at 373.

Accord, McGee v. United States, 462 F.2d 243, 245 n.2 (2 Cir. 1972); United States v. Espinoza, 481 F.2d 553, 555 (5 Cir. 1973) ("a defendant retains a right not to be sentenced on the basis of invalid premises.")

The sentence at bar in a very real sense, is "an incorrect application of the sentencing guidelines," "is outside the applicable guideline range," and "is unreasonable." 18 U.S.C. 3742(e)(2) & (3). The Ninth Circuit has stated that in reviewing district court departure from Sentencing Guidelines, a Court of Appeals will determine if departure is unreasonable either in direction or degree. United States v. Lira-Barraza, 897 F.2d 981, 986 (9 Cir. 1990). Where a "sentence seems to rest on such incredible assumptions that it deserves

another look by the ... district judge" (Ferra, App. 5, Cudahy, J., dissenting in part)--said sentence is unreasonable in direction and degree. Application of such sentence is violative of due process, in that it amounts to sentencing on the basis of invalid premises, and assumptions which cannot be rationally regarded as materially correct. Townsend, supra; Tucker, supra.

The requirement that aggravating factors must be found by a preponderance of the evidence, must be given some credence and accord. See, United States v. Fonner, 920 F.2d 1330, 1333 (7 Cir. 1990); United States v. White, 888 F.2d 490, 499 (7 Cir. 1989).

It is clear that departure from sentencing guidelines must be based on

factual findings supported by record. United States v. Sands, 908 F.2d 304 (8 Cir. 1990); United States v. Delvecchio, 920 F.2d 810 (11 Cir. 1991). Upward departures may not be unreasonable. Fonner, supra; United States v. Huddleston, 929 F.2d 1030 (5 Cir. 1991).

A finding of fact will be held to be "clearly erroneous," if the record lacks substantial evidence to support it. Thelma C. Raley, Inc. v. Kleppe, 867 F.2d 1326, 1328 (11 Cir. 1989). The rule establishing a clearly-erroneous standard of review of findings of fact does not forbid an independent examination of the entire record. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 80 L.Ed.2d 502 (1984). Under the clearly erroneous standard, the role and duty of the Court of Appeals are to determine

whether the trial court's findings are clearly erroneous and to sustain the findings if they are not clearly erroneous but to set them aside if they are. Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526, 61 L.Ed.2d 720 (1979).

Again, as so aptly stated by Justice Cudahy in dissent, the "scenario underlying the sentence called for the burglar Diaz to meet with Ferra almost every day, including Sundays and holidays, in order to trade stolen goods for cocaine 200 times over a period of 30 weeks. I suppose it is conceivable for a highly motivated burglar to burgle at such a frenzied pace, but for him to meet and transact business with his 'fence' that frequently is simply unimaginable. The alternative rationale furnished by the majority (based on the amount of cash

discovered) was discounted by the district court, which must, in any event, make these determinations in the first instance." (App. 5) (Emphasis added.)

With the able Justice Cudahy, in plain dissent, calling the findings below "incredible" and "unimaginable"-- deference to the District Court's determinations should not occur. Justice requires more protection than that afforded below.

At bar, the "unimaginable" and "incredible assumptions" the court made to justify departure, impel the conclusion that the sentence imposed was clearly erroneous. With no justification existing for the court to have made such leaps in punishment, defendant has been sentenced on the basis of erroneous

information, and invalid premises, in violation of due process.

This Court should grant certiorari to interpret Guideline standards for assistance to both District Courts and Courts of Appeals.

CONCLUSION

Defendant prays that the Court grant this writ, and review the judgment below.

Respectfully submitted,

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APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-1584

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAIME L. FERRA,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 CR 98—**Robert W. Warren**, *Judge.*

ARGUED OCTOBER 17, 1991—DECIDED NOVEMBER 19, 1991

Before BAUER, *Chief Judge*, and CUDAHY and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Jaime Ferra, a fence who paid for his merchandise with cocaine, received 120 months' imprisonment. After remand for exploration of three subjects, 900 F.2d 1057 (1990), the district court reentered the 120-month sentence, although on substantially different reasoning.

1. The record on the first appeal revealed a conflict between Detective Leger's application for a search warrant and Sergeant Flores' testimony at trial. The warrant issued on Leger's representation that his reliable informant thrice bought cocaine from Ferra, who said there

was plenty of cocaine left. Flores testified at trial that he visited Ferra once in the company of "Nicky", a person of unknown reliability who asserted that he had obtained cocaine from Ferra on other occasions.

On remand Leger testified that his "confidential informant" was none other than Flores, described thus to protect his identity while the investigation continued. The three-visit business is untrue, but the district court found that it was a confabulation of what Flores told Leger about his own activities with what Flores told Leger he had learned from Nicky. The district court found that Leger's errors were negligent rather than deliberate. More: Even deliberately inaccurate representations do not invalidate a warrant if the truthful statements establish probable cause. *United States v. Danovaro*, 877 F.2d 583, 587 (7th Cir. 1989); cf. *Franks v. Delaware*, 438 U.S. 154, 171-72 & n.8 (1978). What Flores learned during his single visit establishes probable cause for a search. Had Leger accurately identified Flores as the "informant" and omitted everything else, a warrant would have been forthcoming. The district court therefore properly denied the motion to suppress.

2. Israel Salva testified as Ferra's co-conspirator, which allowed the use of testimony that otherwise would be hearsay, yet the district judge did not find that Salva was indeed a conspirator. On remand the court made that finding, which is not clearly erroneous. The picture is complicated because Salva began cooperating with the police. The judge ruled that he ceased being a conspirator at that point, see 900 F.2d at 1059 and *United States v. Patel*, 879 F.2d 292 (7th Cir. 1989), but that statements after Salva changed sides could be admitted against Ferra as adoptive admissions. Ferra has not challenged that decision on appeal.

3. Sentencing is the principal issue on this appeal, as it was the first time around. The district court initially computed Ferra's range under the sentencing guidelines at 41-51 months but imposed a sentence of 120 months,

reasoning that Ferra's status as a fence paying in cocaine justified an upward departure. We reversed that decision, holding that the district court must justify the extent of any departure using the structure of the guidelines, and that in particular a court may not impose a greater sentence by departing than it could have imposed had all of the additional conduct been charged expressly in the indictment. 900 F.2d at 1061-64. We pointed out, however, that Ferra's guideline range might have been computed improperly, for it was based on the amount of cocaine mentioned in the indictment (5½ ounces) but should have been based on all cocaine sold during the course of Ferra's scheme. *Id.* at 1063, relying on U.S.S.G. §1B1.3(a)(2).

On remand the district court determined that Ferra's course of conduct included the sale of more than 500 grams of cocaine. This, coupled with two levels for a managerial role, see U.S.S.G. §3B1.1(c), increased Ferra's guideline range so that 120 months was no longer a departure. The court re-imposed the 120-month sentence. The managerial enhancement is not clearly erroneous; the court could find that Ferra "managed" a stable of thieves by requesting them to supply him with specific merchandise. Although the court could have found that the burglars were independent entrepreneurs rather than Ferra's minions, we do not disturb decisions that could go either way. (Lest there be doubt, however, we reject the prosecutor's argument that an enhancement under §3B1.1(c) is proper just because a fence, by offering to buy goods, makes burglary more profitable. The guidelines refer to a managerial role; the buyer in an ordinary market transaction is not a "manager." Moreover, we rebuffed an argument of this stripe on the first appeal, 900 F.2d at 1064, and are surprised to see it resurrected.)

When the police executed the search warrant they found 164 grams of cocaine on the premises, together with about $50,000 in cash and stolen property. A second search turned up another 10 grams. Ferra paid Flores and "Nicky" 21 grams of cocaine for their goods, and he gave Hobbs (a

burglar) 28 grams. The district court put the total over 500 grams because Diaz, another burglar, testified at trial that he sold stolen items to Ferra approximately 200 times. If Ferra paid Diaz cash plus one-sixteenth ounce of cocaine each time (as he did with Nicky and Hobbs), then he distributed 354 grams of cocaine to Diaz alone. That put the total comfortably over 500 grams.

Ferra contends that Diaz must have been puffing. They dealt with one another for about eight months, part of which Diaz spent in jail; to reach 200 sales, Diaz must have pulled off more than one job per day. Yet some burglars are hyperactive; whether Diaz was a big-time thief or a big-time liar is for the district judge to decide. Even if we were to discount Diaz's story, the district judge would have been entitled to conclude that Ferra doled out a substantial quantity of cocaine for the cash and merchandise on hand at the time the police arrived. The police recovered more than $40,000 in cash, some $14,000 of which was mingled with cocaine (a dog found the money by scent). This exceeds the wholesale price of a kilogram of cocaine. The 174 grams of cocaine seized by the police, the testimony of the burglars, and the inference to be drawn from the cash and inventory, support the conclusion that Ferra distributed more than 500 grams of cocaine.

AFFIRMED

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

I agree that the conviction must be affirmed. But the sentence seems to rest on such incredible assumptions that it deserves another look by the able district judge.

The scenario underlying the sentence called for the burglar Diaz to meet with Ferra almost every day, including Sundays and holidays, in order to trade stolen goods for cocaine 200 times over a period of 30 weeks. I suppose it is conceivable for a highly motivated burglar to burgle at such a frenzied pace, but for him to meet and transact business with his "fence" that frequently is simply unimaginable. The alternative rationale furnished by the majority (based on the amount of cash discovered) was discounted by the district court, which must, in any event, make these determinations in the first instance.

The majority too lightly regards the requirement that aggravating factors must be found by a preponderance of the evidence. *United States v. Fonner*, 920 F.2d 1330, 1333 (7th Cir. 1990); *United States v. White*, 888 F.2d 490, 499 (7th Cir. 1989). In the majority of cases the Sentencing Guidelines provide for stiffer penalties for baseline offenses than federal judges were wont to deliver when their discretion was less restricted. *See* United States Sentencing Commission, *Guidelines Manual* 1.9 (1990) (original policy decisions of Commission projected to lead to 10% increase in prison populations); United States Sentencing Commission, *Annual Report 1989* 66 (policy decisions of Commission embodied in 1989 amendments expected to lead to approximately 5% further increase). If enhancements may be applied at a judge's discretion, Guideline sentencing becomes a one-way street: district judges may impose arbitrarily high sentences, but not arbitrarily low sentences.

I do not suggest that the district judge abused his discretion in imposing sentence on Ferra. But the record makes clear that the sentence is exactly that—an exer-

cise of discretion. This is a practice that the Guidelines do not allow.

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In the
United States Court of Appeals
For the Seventh Circuit

No. 89-1507

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAIME L. FERRA,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 88 CR 98—**Robert W. Warren**, *Chief Judge.*

ARGUED NOVEMBER 30, 1989—DECIDED APRIL 24, 1990

Before POSNER, COFFEY, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Jaime Ferra was a fence specializing in weapons. He is in prison for selling both guns and cocaine to undercover agents. The district court departed from the Sentencing Guidelines, giving Ferra 120 months' imprisonment instead of the 41-51 months they prescribe. Although Ferra's appellate lawyer raises a dozen issues, only four call for comment: the adequacy of hearings on motion to suppress evidence and exclude co-conspirator hearsay, the propriety of an instruction telling the jury that errors of law are corrected on appeal, and the departure from the Guidelines.

1. In April 1988 a state judge issued a warrant authorizing a search of Ferra's tavern. The judge acted on the basis of oral testimony by detective Kenneth Leger of the Milwaukee police. Leger testified that a "confidential informant, along with another unknown person", had purchased cocaine from Ferra in that building within the last 72 hours. Leger also testified that the informant, whom he had known for five years, had furnished reliable information on numerous occasions. Counsel moved before trial to suppress the fruits of the search: cocaine, guns, and cash. The district judge denied the motion because Leger's description of the informant's reliability established probable cause. Leger did not testify at Ferra's trial. Sergeant Vincent Flores, who did, testified that his purchase of cocaine in the company of one "Nicky" was the basis of detective Leger's testimony in support of the warrant. According to Flores, "Nicky", who could no longer be located, was not a regular informant and did not even know that Flores was a police officer. Counsel renewed his motion to suppress and asked for a new hearing, arguing that Flores contradicted every material feature of Leger's testimony in support of the warrant; the district judge declined to take additional evidence on the subject and denied the motion.

Leger described a reliable informant who made a buy in the presence of an "unknown person". Flores described visiting Ferra's bar and using the services of Nicky, who was not an informant, to buy 1/16 ounce of cocaine for $50 and a stolen microwave oven. Flores testified to events that demonstrate probable cause for a search, but these are not the events relayed to the state judge; if Ferra is correct, what the state judge was told is fiction. Then the evidence must be suppressed, because having probable cause is not enough; the police must present the facts establishing that cause to the judicial officer. *Whiteley v. Warden*, 401 U.S. 560, 564-65 (1971). It may be, however, that Leger and Flores were describing different buys, and that the informant to whom Leger referred is not Nicky. (Although Flores testified that his buy with Nicky was

the basis of Leger's testimony, the two described transactions on different dates.) Perhaps Nicky was Leger's informant unbeknownst to Flores, and Nicky told Leger what had happened ignorant that the person with him at the time was an officer. These questions were well worth the court's time to explore, because on one view of the facts the evidence must be suppressed and on another the warrant stands. We shall remand the case for an evidentiary hearing on this question. Because the district court may conclude that the evidence is admissible, and because the other questions in this case may recur in a new trial if it is not, we shall press on.

2. Some of the testimony against Ferra concerned statements Israel Salva made. The prosecution depicts Salva as Ferra's co-conspirator; Ferra insists that Salva was simply a buyer of Ferra's guns. The evidence allows the district court to find by a preponderance, as Fed. R. Evid. 104 requires, see *Bourjaily v. United States*, 483 U.S. 171 (1987), that Salva and Ferra were co-venturers. An agent initially bought guns from Ferra through Salva, who turned the money over to Ferra; Ferra told the agent to go through Salva if he wanted to buy more. After Salva decided to cooperate with the government, he and Ferra had a recorded conversation in which Ferra undertook to supply additional guns through Salva. This recording did not become inadmissible on the theory that conversations after one conspirator has been "turned" cannot possibly be in furtherance of the conspiracy. Whether such an exchange is admissible depends on whether the conspiracy is over, which depends in part on whether the conspirator-turned-informant has withdrawn. Although the inference that a turncoat has withdrawn is strong, it is not inevitable, and the decision rests in the hands of the district judge. *United States v. Patel*, 879 F.2d 292 (7th Cir. 1989). Anyway, parts of this conversation damning to Ferra were his own words, which could come in as admissions no matter Salva's status. Fed. R. Evid. 801(d)(2)(A).

The difficulty concerning all of Salva's statements is that Rule 104 calls for the district judge to make a preliminary

determination that the declarant was a conspirator acting in furtherance of the criminal adventure. Ferra objected when the prosecutor first offered Salva's hearsay statements. The district judge declined to entertain evidence or make the findings required by Rule 104. See *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978). Instead, the judge observed that

> if I am told by the proponent of the evidence that that's what it is [co-conspirator declarations], why, then I would overrule the objection subject to [a] sanction . . . .

The "sanction" the judge had in mind was that if "the evidence of the conspiracy does not come forth", then there would be a mistrial.

Although we have approved admission-subject-to-connection under Fed. R. Evid. 104(b), see *United States v. Troop*, 890 F.2d 1393, 1404 n.18 (7th Cir. 1989); *United States v. Andrus*, 775 F.2d 825, 836-37 (7th Cir. 1985), this is an exceptional rather than a routine procedure. *Andrus* and *Troop* imply that it is appropriate only when the evidence on the question of conspiracy is extensive—which it is not in Ferra's case. Most of the time it is best to make a preliminary determination rather than to attempt at the end of the case to recollect whether the evidence satisfies the standard for admissibility. No one wants to retry criminal cases if something goes wrong in the process of supplying the foundation for the evidence. Especially not when there is a potential double jeopardy problem. Defendants ordinarily are entitled to a final decision by the first tribunal. Although a defendant's motion for a mistrial releases the strict "manifest necessity" standard, see *United States v. Dinitz*, 424 U.S. 600 (1976), a court ought not routinely build into the case a feature that will force the defendant to move for mistrial in order to make a simple objection to the admission of evidence.

Even in a fairly complex case, the district judge should require the parties to state what they believe the evidence will establish and then decide whether that will suffice.

The prosecutor will have to make good his promise, but at least everyone will know in advance that the prosecutor needs to establish such-and-such, and that doing so will carry the day. When the district judge brushes off the hearsay objection, the prosecutor does not know what is necessary or sufficient, and the subject may get lost amidst the many other issues. That may well have happened in Ferra's trial. We cannot find a definitive ruling in the record. Although at the end of the trial the judge said that "there are declarations in [the tape] that are in furtherance of the conspiracy", he did not explain why, or what distinguishes these from others. How to treat the words of a conspirator-turned-informant is a question of some delicacy, as *Patel* shows. As this case is being remanded to reconsider the basis of the April 1988 search warrant, we shall ask the district judge to make a focused decision on the co-conspirator hearsay question as well.

3. The instructions to the jury in *United States v. Fiorito*, 300 F.2d 424, 426 (7th Cir. 1962), included this passage:

> I had certain reasons when I sustained an objection, because I don't want to retry it again, I don't want to rehash certain parts of it again. You have heard it. If you forget it, that is part of the game, and if I forget it, that's part of the game. That's why we have a court of appeals, they will reverse me if I'm wrong. This is not the final judgment, there is a court of appeals to reverse me and a Supreme Court to review them. That's why we have a great system here.

Fearing that the jury may have understood the invitation to "forget it" to refer to the evidence or limiting instructions given in conjunction with its admission, and concerned that the reference to appellate review may have led the jurors to think that if they did "forget it" someone else would put things to rights, the court reversed the conviction. "[I]t was inferred [sic] that the jury's determination was not to be the final one but would be reviewed

by this Court and the United States Supreme Court. Such dilution of the final responsibility of the jury as was thus inferred [sic] as permissible to the jury in its determination of the verdict is prejudicial to a defendant." *Id.* at 427.

The judge instructed Ferra's jury this way:

> Your purpose as jurors is to find and determine the facts, the truth under our system. In a criminal procedure, you are the sole judges of the facts . . . . It is especially important that you perform your duty of determining what the facts are diligently and conscientiously because you are the only ones that ever do that.
>
> If I tell you what the law is and I tell you wrong, why, an appellant court can straighten me out, but nobody else determines what the facts are. You do that, and so it's important that you do it with devotion to the task.
>
> On the other hand, and with equal emphasis, I would instruct you that the law that I give you constitutes the only law for your guidance. It is your duty to accept and follow the law as I tell you it exists even though, for instance, you might disagree with the law or think it's a bum law, or think that I am telling you about it wrong.

Ferra maintains that the reference to appellate review in this instruction yields "dilution of the final responsibility of the jury", *Fiorito*, 300 F.2d at 427, and calls for a new trial.

Fiorito's jury was given an "I'm OK, you're OK" instruction. Not to worry, things will take care of themselves. The court of appeals appears in Fiorito's trial as a deus ex machina to save the day. Ferra's jury was told that it must be careful and diligent, because it is the sole judge of the facts. Jurors must be conscientious, because "you are the only ones ever to do that." The court of appeals appears in Ferra's trial as a way to settle ques-

tions of law, leaving jurors as the "sole judges" of the facts.

Language in *Fiorito* appearing to forbid any mention of appellate courts should not be removed from the context of the instruction to Fiorito's jury. Truth usually promotes the operation of the judicial system. Jurors need not be left to wonder about the allocation of tasks between trial and appellate courts. Carefully phrased, as it was in Ferra's case, advice that legal errors are subject to correction helps to flesh out jurors' knowledge of their role. Most jurors are legal novices. They may believe that they are entitled to form their own views about the law; if told that legal questions are for the judge, they may rebel and vote in the teeth of the evidence if their legal views clash with the judge's. Jurors who know that the judge's views of law are not the last word are more likely to confine themselves to their proper task—finding the facts and applying the law to them. The instruction told Ferra's jurors simply and accurately that they are judges of the facts and that the ultimate decision on points of law lies elsewhere. Such advice does not dilute the sense of responsibility but rather focuses jurors on their true responsibilities. *United States v. Miceli*, 446 F.2d 256, 259-60 (1st Cir. 1971).

4. Ferra was convicted of selling two guns and 5.83 ounces of cocaine. This produced an offense level of 21 which, when combined with Ferra's criminal history category of II, yielded a guideline range of 41-51 months. The district court sentenced Ferra to 120 months' imprisonment, more than twice the maximum under the guidelines. The court gave this explanation:

> Jaime Ferra was a fence, no question about it. He was a fence for a substantial number of burglars in Milwaukee. The crimes they committed were visited upon literally hundreds of homes, as I recall the one witness testified something in excess of 200 burglaries. When I think about all of the anguish and the furor and the frustration that those burglaries would cause

> to the people whose lives and homes were invaded, and then think about the fact that they, the burglars have got a ready market here not just even for cash, but for cocaine, which is going to feed the whole system, I feel that there are aggravating circumstances.
> . . .
>
> The pending cases in the state would indicate that the day after he's searched, why he's out dealing in cocaine again. I was struck by that. But there was a search on . . . [April 22, 1988], and on 4-29-88 Milwaukee police sergeant acting in an undercover capacity purchased a 16th ounce of cocaine from Mr. Ferra at the El Moro bar.
>
> Based on these kinds of circumstances, the interrelationship between being a fence and payment in cocaine and the way in which that expands the crime problem in our urban community, the court does feel that defendant's criminal history category significantly underrepresents the seriousness of the defendant's criminal history, and also I think underrepresents the likelihood that he will commit further crimes. This is particularly as one takes into account all of the felony, state felony charges for concealing and receiving stolen property, and secondly, I am satisfied in my own mind that the quantity of cocaine seized underrepresents the total amount this defendant was involved with, as testified to by a number of witnesses at the trial.

Although the court explained why it was exceeding the guidelines, it did not explain why it selected 120 months.

The judge believed that Ferra's criminal history category understated his history and dangerousness for two reasons: he kept dealing in drugs after his first arrest, and he committed more crimes than he had been convicted of. The judge believed that the charges understated the seriousness of the offense for four reasons: Ferra sold more cocaine than the 5½ ounces charged; he bought stolen property, a crime with which he had not been charged;

fences induce people to become burglars, which causes misery; buying stolen goods with drugs is especially serious. The statute allows departure if either the criminal history or the charge understates the seriousness of the crime, for reasons the Sentencing Commission has not adequately considered. 18 U.S.C. §3553(b). The purchase of stolen guns for cocaine is, if nothing else, sufficiently unusual—outside the "heartland" of characteristics defined by the aggravating and mitigating circumstances specified in the guidelines, U.S.S.G. Ch. I, pt. A(4)(b), p. 1.6 (policy statement)—that a departure is authorized.

Every departure must be "reasonable" in extent, 18 U.S.C. §3742(e)(3); *United States v. Jordan*, 890 F.2d 968, 977 (7th Cir. 1989). A judge may not say: "I have decided to depart, so I now throw away the guidelines." The guidelines are designed to bring openness and consistency to sentencing, to even out the effects of different judges' perspectives on desert and deterrence. Departures are authorized because no set of rules, however comprehensive, can capture all features that may turn out to be important. *United States v. Pinto*, 875 F.2d 143 (7th Cir. 1989). Unless there is discipline in determining the amount of departure, however, sentencing disparity will reappear. One judge may think that buying stolen goods with cocaine is worth 120 months, another that it requires 180, still another that it calls only for 60 (or no departure). Almost by definition, there cannot be rules for computing the amount of departure—for if it were possible to do this, the factors could be included in the guidelines, avoiding "departures" altogether. But it is possible to formulate approaches that link the extent of departure to the structure of the guidelines.

The Sentencing Commission did this with respect to departures when the criminal history category does not adequately reflect the seriousness of the defendant's former crimes or the likelihood of his committing more. If, say, Category II is too low, then the judge should use Category III or IV rather than pitch the guidelines. "[T]he Commission intends that the court use, as a reference,

the guideline range for a defendant with a higher or lower criminal history category, as applicable." U.S.S.G. §4A1.3 (policy statement). Even when the judge departs upward from Category VI, the most serious, the guideline table provides a resource: the vertical increments (more serious crime) are identical to horizontal increments (more serious criminal history). A judge who runs out of criminal history levels may read down to find the next higher range. See *United States v. Schmude*, No. 89-1478 (7th Cir. Apr. 9, 1990), slip op. 6-7 (what comes to the same thing, suggesting that the judge increase the sentence by 10-15%, the amount of each increment across or down in the guideline table).

Although the Commission did not discuss whether the same approach should be used for departures based on the seriousness of the crime, it makes sense to do so. The guidelines assign to each offense a "base" level, with points added or subtracted in response to additional considerations. For example, §2D1.1, the main drug offense guideline, uses the quantity of drug sold or possessed to set the base offense level, then adds two levels for using a gun. Guideline §2D1.2 provides another two-level increase if the sale took place near a school or was to underage buyers. The Commission prescribed the same method for downward adjustments. Substantial assistance to the prosecution produces a subtraction of two offense levels, and so on.

When an aggravating circumstance is sufficiently rare that the Commission does not specify the amount of the increase, the judge may depart. In departing the judge should compare the seriousness of the aggravating factors at hand with those the Commission considered. Congress prescribed the method of analogy for crimes without guidelines, 18 U.S.C. §3553(b), and it is equally appropriate for crimes with guidelines but without sufficient detail in the lists of aggravating and mitigating circumstances. So if possessing a gun during a sale elevates the offense by two levels, the judge might conclude that buying a gun with drugs elevates the offense by four levels, an upward "departure" of two levels.

An alternate method of computing upward departures is to treat the aggravating factor as a separate crime and ask how the defendant would be treated if convicted of it. Take Ferra's case as an example. U.S.S.G. §2B1.2 covers the receipt of stolen goods. The base offense level is 7 when the defendant purchases drugs or guns, §2B1.2(b)(2). Because Ferra was a fence, in the business of buying stolen property, §2B1.2(b)(3)(A) calls for an additional 4 levels. Guideline §2B1.2(b)(1) requires a further increase if the property was worth more than $100. If Ferra purchased $500,000 worth, the amount of increase from §2B1.1(b)(1)(M) is 12 levels. This is a total base offense level of 23, two levels above the 21 computed for his cocaine sales. The guidelines do not merge purchases of guns and sales of drugs, U.S.S.G. §3D1.2, because the victims differ. Under §3D1.4 all fencing activity is a single "unit" of crime. Adding a new "unit" of crime calls for the judge to start with the most serious offense (the 23 points for receipt of stolen goods) and add two levels (from the drug sales), producing a total of 25—an effective increase of four levels from the 21 for the crimes of which Ferra was convicted. If we take Ferra's criminal history category as II, the guideline range becomes 63-78 months. If we increase the criminal history category to III on the ground that level II understates Ferra's background and dangerousness, the range becomes 70-87 months. Since this is what Ferra would have received had he been convicted of fencing, a "departure" should not exceed this level. It would throw the structure of the guidelines out of kilter to say that a defendant may receive more time on a "departure" than he could have received had he been convicted of the crimes leading the judge to depart. See *United States v. Kim*, 896 F.2d 678, 684-86 (2d Cir. 1990), recommending this analogy to the grouping rules as the standard way to determine the amount of departure.

There is a third route in a case such as Ferra's, one that increases the sentencing range but is not strictly a departure. Under U.S.S.G. §1B1.3(a)(2) all drugs that were

handled as "part of the same course of conduct or common scheme or plan as the offense of conviction" should be aggregated before the application of the drug quantity tables in §2D1.1. See *United States v. White*, 888 F.2d 490 (7th Cir. 1989). The computation of Ferra's guideline range assumed that he sold only 5½ ounces of cocaine, the amount charged in the indictment. Under §1B1.3(a)(2) the court is supposed to add all additional amounts that were part of the same course of conduct. Suppose information in the record enabled the judge to determine that Ferra was doling out a kilogram of cocaine per year to buy stolen merchandise. That would produce a base offense level of 26, increased two levels on account of the guns. A level 28 offense produces a range of 87-108 months for a person with a criminal history category of II, and a range of 97-121 months for someone with a criminal history category of III. So the district judge might be able to sentence Ferra to 120 months without "departing" in any way other than a one-level increase in criminal history category. But perhaps one kilogram is an overestimate of Ferra's business; we lack the information essential to an informed application of the guidelines, because the district court and the parties did not consider the effects of §1B1.3(a)(2).

Enough of theory. What of this record and the reasons the district judge gave? If the district judge meant, as he said, to depart through the method of increasing the criminal history category, then the sentence is defective because the judge did not attempt to show why 120 months is reasonable. If the offense score is 21, jumping the criminal history category all the way to level VI (the most serious) produces a range of 77-96 months. It would be hard to justify a leap to Category VI. A parallel to one of the factors the judge considered—that Ferra continued committing crimes after the search and arrest in April 1988—is built into the computation of the criminal history. U.S.S.G. §4A1.1(d) awards two extra points to defendants who commit crimes "while under any criminal justice sentence". A crime while on release pending trial should not

be treated more seriously. A two-point increase does not get Ferra past level III. The other factor, the long-running nature of the operation with many un-charged crimes, is a recognized ground of departure, see §4A1.3(e) (policy statement), but does not authorize skyrocketing ratings. Most criminals commit crimes in addition to those for which they have been convicted; the guidelines suppose this and authorize a downward departure for one-shot offenses. U.S.S.G. Ch. I, pt. IA(4)(d). Drug offenses, in particular, are likely to involve continuing conduct. So too with receiving stolen property, which like drugs has a quantity table that aggregates the value of related transactions. Similar crimes come into the computation through aggregation of amounts, not through departures. The "heartland" circumstances, for which the guidelines are designed, include a pattern of similar conduct, so the pattern is not a sufficient reason for departure.

If the district judge meant to depart by increasing the seriousness of the offense, the sentence is no less problematic. Again the judge did not explain why he chose 120 months. See *United States v. Carey*, 895 F.2d 318, 322 (7th Cir. 1990). The best way to justify a higher sentence is to compute the full quantity of drugs involved, as §1B1.3(a)(2) requires; the court did not make findings on this subject, however, beyond remarking that 5½ ounces is too little. Although Ferra's fencing is a serious crime, the fact that he committed some un-charged offenses is not a good reason for departure. *United States v. Missick*, 875 F.2d 1294, 1302 (7th Cir. 1989). The guidelines implement a system of charge-offense sentencing. When the prosecutor elects not to charge a crime, it may not be the basis of sentence unless it was part of the offense of conviction or is related to it in a way the guidelines specify—such as through the drug quantity tables, or because the un-charged crime shows that the crime of conviction is more serious. A crime that has not been charged, and that does not reflect on the seriousness of the crime of conviction, may not be the basis of a departure, as we held in *Missick*.

Similarly, that fences make burglary more profitable (and burglary makes fencing more profitable; which is responsible?) and so leads to more burglaries, is not a reason to enhance a sentence beyond what would be appropriate for the fencing alone. Again this is because the characteristic is part of the heartland of the offense. *All* persons who buy stolen goods create this kind of injury. So too with sellers of drugs. Many people believe that in order to raise money to pay for cocaine, users commit additional crimes such as burglary. Yet this would not be a good reason to depart from the cocaine guidelines. Because it is true of the cocaine business as a whole, it does not distinguish one defendant's crime from another's and so does not justify departing from the ranges that apply to the bulk of crimes. *Carey*, 895 F.2d at 324-26; see also *United States v. Rosen*, 896 F.2d 789 (3d Cir. 1990).

Ferra's fencing was part of his drug and gun business, however, so the district judge was free to consider his activities as a fence without transgressing against the charge-offense system of the guidelines. Application of the quantity tables on the authority of §1B1.3(a)(2) should capture the significance of the whole business. If it turns out otherwise, however, the judge retains freedom to depart. In justifying such a departure, the judge should identify why the computation of the full quantity of drugs involved does not reflect the seriousness of the offense, and adjust the offense level by an amount proportional to the difference. The Commission prescribes two-level adjustments for relatively serious offense characteristics, and departures of more than two levels should be explained with a care commensurate with their exceptional quality.

Ferra raises eight additional issues. *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990), disposes of one. The others do not require separate analysis. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

No. 89-1507

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